

Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| Amendment of Section 73.202(b), |) | |
| Table of Allotments, |) | MM Docket No. 01-5 |
| FM Broadcast Stations. |) | RM-10028 |
| (Butler and Reynolds, Georgia) |) | RM-10107 |
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MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 15, 2006

Released: February 17, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) a Petition for Reconsideration of a *Report and Order*¹ in this proceeding filed by H. David Hedrick ("Hedrick"); (2) an Opposition to Petition for Reconsideration filed by Fort Valley State University ("FVSU"); (3) and other related pleadings.² For the reasons discussed below, we deny Hedrick's Petition for Reconsideration.

BACKGROUND

2. At the request of Hedrick, the *Notice of Proposed Rule Making*³ in this proceeding proposed the allotment of Channel 245A to Butler, Georgia (pop. 1,673) as a first local service. In response to the *NPRM*, Hedrick filed Comments, expressing his continuing interest in the proposed allotment;⁴ however, the Comments were received two days after the comment deadline established in the *NPRM*.⁵ In addition, FVSU filed a timely counterproposal to allot Channel *245A to Reynolds, Georgia (pop. 1,166) as its first local service and to reserve the channel for non-commercial educational ("NCE")

¹ *Butler and Reynolds, GA*, 17 FCC Rcd 1653 (MMB 2002) ("*R&O*").

² On August 12, 2003, FVSU filed a Petition for Leave to File Supplement and a Supplement to Opposition to Petition for Reconsideration and Statement for the Record to update the record in this proceeding by providing information on facts that have changed since the Commission released its *R&O*. We will grant the motion and accept the Supplement because it will facilitate resolution of this case.

³ *Butler, GA*, 16 FCC Rcd 736 (MMB 2000) ("*NPRM*").

⁴ Paragraph 2 of the Appendix to the *NPRM* states that "[t]he proponent of a proposed allotment is . . . expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request." *Id.* at 739

⁵ The *NPRM* established a comment deadline of March 5, 2001; and Hedrick's comments were received at the Commission on March 7, 2001.

use.⁶ FVSU's counterproposal is mutually exclusive with Hedrick's rulemaking petition because Channel 245A at Butler is short-spaced to Channel *245A at Reynolds.⁷

3. The *R&O* denied Hedrick's rulemaking petition because consideration of his untimely expression of interest would prejudice a timely filed, conflicting proposal.⁸ Because there were no other acceptable expressions of interest in the proposed Butler allotment,⁹ it was not necessary to make a comparative evaluation of the two proposals. Instead, the *R&O* examined the merits of FVSU's counterproposal and found that it was in the public interest to allot Channel *245A to Reynolds, as its first local service, and to reserve the channel for NCE use. The *R&O* stated that the requirements for reserving the channel for NCE use were met because of the unavailability at Reynolds of a channel in the reserved NCE FM Band (Channels 201 to 220). Further, the requested allotment of Channel *245A could provide a second NCE radio service to 2,000 or more people who constitute ten percent of the population within the channel's 60 dBu service contour.¹⁰

4. In his Petition for Reconsideration, Hedrick states that his comments arrived late due to an unforeseen six-day postal delivery delay. In support of this position, he submits a copy of a U.S. Postal Service Certified Mail Receipt, showing that the comments were mailed on March 1, 2001, from Gray, Georgia, and a copy of a U.S. Postal Service Return Receipt, indicating that the comments were received at the Commission on March 7, 2001.

5. Hedrick next claims that several new facts or changed circumstances warrant reconsidering the *R&O*. First, based upon the 2000 U.S. Census, the population of Butler has increased 14 percent to 1,907 while the population of Reynolds has decreased 11 percent to 1,036. Second, the *R&O* should be set aside in light of the Commission's adoption of a *Second Further Notice of Proposed Rule Making* in MM Docket No. 95-31 regarding the licensing of non-reserved FM channels when both commercial and NCE parties are applicants.¹¹ Third, Hedrick alleges that FVSU, its attorney, and consulting engineering deliberately omitted facts when they stated in the technical exhibit of their counterproposal that "[n]o over the air broadcasting is available to students other than the carrier current AM system that can be heard in selected buildings on campus" In support of this position, Hedrick submits a copy of an article from the February 7, 2002, *Macon, GA Telegraph*, reporting on the establishment of a low power, cable FM system that radiates its signal on campus and nearby.

6. Finally, Hedrick argues that the *R&O* committed two errors of law. First, Hedrick argues that the wrong test was applied in deciding between Butler and Reynolds because the *R&O* relied

⁶ See 47 C.F.R. § 73.202(a)(1), which provides that channels in the non-reserved FM band designated with an asterisk may be used only by NCE stations.

⁷ See 47 C.F.R. § 73.207. The required spacing between Channel 245A at Butler and Channel *245A at Reynolds is 115 kilometers whereas the actual spacing between these proposals is 11.6 kilometers.

⁸ See *Santa Isabel, PR and Christiansted, VI*, 3 FCC Rcd 2336 (1988), *aff'd. sub nom. Amor Family Broadcasting v. FCC*, 918 F.2d 960 (D.C. Cir. 1990).

⁹ Although BK Radio ("BK") submitted an expression of interest in the proposed Butler allotment, its comments were unacceptable and not considered because BK did not comply with Section 1.52 of the Commission's rules. This rule requires that all pleadings filed by parties not represented by legal counsel be signed and verified by the petitioner and provide the petitioner's mailing address. While BK's comments were signed by a partner and an address was provided, no verification statement was supplied. BK did not file a petition for reconsideration of the dismissal of its expression of interest.

¹⁰ The allotment of Channel *245A at Reynolds could provide a second NCE service to 5,336 persons, representing 13.75 percent of the total population of 38,802 persons within the proposed 60 dBu service contour.

¹¹ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 17 FCC Rcd 3833 (2002) ("*Second FNPRM*").

upon the Reynolds proposal providing a second NCE service to 2000 or more people instead of comparing the populations of the two communities, Reynolds and Butler. Second, citing *Stuart and Boone, IA*,¹² Hedrick argues that Channel 245A should have been allotted to Butler because it does not require a site restriction while the allotment to Reynolds does.

7. In its Opposition to Petition for Reconsideration, FVSU argues that none of Hedrick's arguments can be considered because Hedrick was late in filing his Comments and FVSU's counterproposal was granted on an uncontested basis. As a result, FVSU contends that it is irrelevant that the population of Butler has increased while the population of Reynolds has decreased or that the Reynolds proposal requires a site restriction but the Butler proposal does not. FVSU also contends that neither FVSU, its attorney, nor its technical consultant deliberately omitted facts in order to obfuscate this proceeding. On the contrary, FVSU's statement in its counterproposal that "there is no over-the-air broadcasting available to students other than the carrier current AM system that can be heard in selected buildings on campus" was true on the date that the counterproposal was filed, March 5, 2001. Thereafter, FVSU states that an FM Radiating Coaxial Cable System was installed, whose power level is so low that the Commission does not require a license for it. FVSU states that the FM system is similar to an AM carrier current system.

8. Additionally, In its Supplement to Opposition to Petition for Reconsideration and Statement for the Record, FVSU notes that, at the time its Opposition was filed, there was no licensed "over-the-air" broadcasting service of any type available to the students of FVSU. However, FVSU states that the situation changed on June 27, 2003, when the Commission granted an application for a new low power FM ("LPFM") station to a broadcasting club at FVSU. Although the *R&O* acknowledged FVSU's reporting of the pendency of the LPFM application, FVSU points out that a window for amendments to LPFM applications was subsequently opened up, enabling this application to be amended and granted.

DISCUSSION

9. Section 1.429 of the Commission's rules sets forth the limited provisions under which the Commission will reconsider a rulemaking action. Reconsideration is warranted only if the petitioner cites error of fact or law has presented facts or circumstances that otherwise warrant Commission review of its prior action.¹³ After careful review of the pleadings, we deny Hedrick's Petition for Reconsideration because it has demonstrated no errors of fact or law.

10. As a threshold matter, Hedrick's late-filed Comments were properly rejected because the Commission's policy is not to consider an untimely filed expression of interest in an allotment where acceptance would cause an adverse impact on a conflicting proposal.¹⁴ This policy has been upheld by the U.S. Court of Appeals for the D.C. Circuit as reasonable and within the Commission's discretion.¹⁵ In the present case, acceptance of Hedrick's late filed expression of interest would cause prejudice to FVSU's counterproposal, which was filed by the comment deadline established in the *NPRM*. Although Hedrick claims that the late filing was due to an unforeseen six-day postal delivery delay, it is the responsibility of the party submitting comments to ensure that documents are delivered to the Commission on time.¹⁶ Indeed, Hedrick had other options to ensure delivery of his comments such as using a courier service or faxing his comments to an attorney or filing service in Washington, DC that

¹² 5 FCC Rcd 4537 (MMB 1990), *recon. denied*, 6 FCC Rcd 6036 (MMB 1991).

¹³ See *Eagle Broadcasting Co. v FCC*, 514 F.2d 852 (D.C. Cir. 1975).

¹⁴ See *Amor Family Broadcasting v. FCC*, 918 F.2d 960 (D.C. Cir. 1990).

¹⁵ *Id.* at 963.

¹⁶ See, e.g., *Gosnell and Osceola, AR, Germantown and Ripley, TN*, 4 FCC Rcd 6170 (MMB 1989) (comments filed one day late due to a problem with the courier used to deliver the Comments to the Commission rejected).

could have filed them by the deadline. His failure to avail himself of these other options does not justify considering his late filed comments in view of our well established policy of not prejudicing conflicting proposals.

11. Hedrick's other arguments do not warrant reconsideration of the *R&O*. First, we agree with FVSU that the relative population changes of Butler and Reynolds are irrelevant because the proposals were not evaluated on a comparative basis. Rather, FVSU's proposal was considered on an uncontested basis and granted because it would serve the public interest and would satisfy the expanded criteria for reserving channels in the non-reserved FM band that were established in MM Docket No. 95-31.¹⁷

12. Second, the pendency of MM Docket 95-31 is not a sufficient basis for setting aside the *R&O* because the issues involved in the *Second FNPRM* and the *Second Report and Order*¹⁸ in that proceeding do not apply in the present case where a channel in the non-reserved FM band has been reserved for NCE use and only NCE applicants can apply. By way of contrast, the *Second Report and Order* in MM Docket No. 95-31 addresses the situation where mutually exclusive NCE and commercial applicants are filed for an FM channel in the non-reserved band.

13. Third, we find that WVSU has not deliberately omitted facts or made a misrepresentation in stating in its counterproposal that "[n]o over the air broadcasting is available to students other than the carrier current AM system that can be heard in selected buildings on campus" Although Hedrick submitted a newspaper article describing the remodeled studios for FVSU's radio and television stations and mentioning that its new FM station will be heard on and near campus, WVSU responded that its new FM Radiating Coaxial Cable System was not operational on the date that its counterproposal was filed. Hedrick has submitted no other evidence to rebut this statement. Further, we note that FVSU had referenced in its counterproposal the pendency of an LPFM application, filed by a campus broadcasting club,¹⁹ and updated the record of this proceeding after the application was granted and became final.

14. Finally, *Stuart and Boone, IA*,²⁰ is inapplicable to the instant proceeding. That case involved a choice between alternate channels in one community, and not a choice between mutually exclusive proposals in different communities. In *Stuart and Boone*, the Commission chose the alternate channel with the less restrictive site because the allotment would be available for application by multiple parties. In the present proceeding, the staff did not consider alternate channels for either Butler or Reynolds.

15. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by H. David Hedrick IS DENIED.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

¹⁷ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386, 7434 (2000) (reservation of a non-reserved band channel warranted if it would provide a first or second NCE service to 2,000 or more people who constitute 10% of the population within the proposed allotment's 60 dBu service contour). Because no comparison was made between the Reynolds and Butler proposals, there is no basis to Hedrick's allegation that the two proposals were compared on the provision of NCE service in lieu of the populations of the two communities.

¹⁸ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 18 FCC Rcd 6691 (2003), *recons. pending*.

¹⁹ See FVSU Counterproposal at 5.

²⁰ 5 FCC Rcd 4537 (MMB 1990).

17. For further information concerning this proceeding, contact Andrew J. Rhodes, Audio Division, Media Bureau (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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